58

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of a Revision Application in terms of Article 138 of the Constitution read with section, 364 and 365 of the Code of Criminal Procedure Act No. 15 of 1979.

CA Revision Application:

CPA/0136/22

The Director General,

Commission to Investigate Allegation of Bribery or Corruption,

No. 36, Malalasekara Mawatha,

Colombo 07.

High Court of Colombo

Case No. HCB/1988/2013

COMPLAINANT

Vs.

Ranaweera Wanasinghe Wanninayake Herath Mudiyanselage Gamini Wanasinghe

No. 349, Divulges Kotuwa, Galewela.

ACCUSED

AND NOW BETWEEN

The Director General,

Commission to Investigate Allegation of Bribery or Corruption,

No. 36, Malalasekara Mawatha,

Colombo 07.

COMPLAINANT-PETITIONER

Vs.

Ranaweera Wanasinghe Wanninayake Herath Mudiyanselage Gamini Wanasinghe

No. 349, Divulges Kotuwa, Galewela.

ACCUSED-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anuradha Siriwardhena, A.D.G. for the petitioner

: Asanka Mendis with Sandeepani Wijesooriya for the respondent

Argued on : 01-11-2023

Decided on : 08-02-2024

Sampath B. Abayakoon, J.

This is an application by the complainant-petitioner (hereinafter referred to as the petitioner), namely, the Director General of the Commission to Investigate Allegations of Bribery or Corruption, invoking the revisionary jurisdiction of this Court granted in terms of Article 138 of the Constitution.

The petitioner is seeking to set aside the order dated 12-09-2022, of the learned High Court Judge of Colombo, marked P-04 and P-05 along with the petition, wherein, the action instituted by the petitioner before the High Court of Colombo was dismissed.

When this matter was supported for notice, this Court, after having considered the relevant facts and the circumstances issued notice to the accused-respondent named.

Accordingly, the accused-respondent was allowed to file his objections in relation to the application and the petitioner was also allowed to file counter objections in that regard.

At the hearing of the application this Court listened to the submissions of the learned Additional Director General of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter sometimes referred to as the Commission) in support of the application, and to the submissions of the learned Counsel who represented the accused-respondent, in order to determine the application before the Court.

This is a matter where the accused-respondent (hereinafter referred to as the accused) was indicted before the High Court of Colombo for committing two counts of bribery, punishable in terms of section 19(b) and 19(c) of the Bribery Act, by accepting Rs. 12500/- as a gratification for doing an official act he was duty bound to perform. The offence had been allegedly committed on 4th July 2012 at Galewela.

The indictment had been served on the accused on 20-02-2014, where the accused had pleaded not guilty.

The trial has taken place before several learned High Court Judges, and when the matter was mentioned before the learned High Court Judge who pronounced the impugned order, the evidence had been concluded and it was for final submissions by the respective parties.

It was the submission of the learned Counsel for the petitioner that when the case was mentioned for the final submissions on 11-10-2021, the presiding Judge inquired from the prosecution whether it had the authorization of all three Commissioners of the Commission to initiate proceedings before the High Court against the accused, for which the reply was that one Commissioner has authorized the institution of proceedings. *(See- Journal Entry at page 77 of the brief).*

This has resulted in an order by the learned High Court Judge by giving a date for the prosecution to consider maintaining the action any further, or to make submissions.

When the matter was mentioned on 03-11-2021, the prosecution has informed the Court that the matter is under consideration by the Commission and the learned Counsel who represented the accused had informed the Court that he is objecting to any withdrawing of the case, and if there is any such application he reserves his right to object to such an application. *(See- Journal Entry at page 379 of the brief)*

The case has been mentioned again for the same purpose on 17-12-2021. The Journal Entry in that regard shows that the learned Counsel for the accused has informed the Court that he is agreeable for the continuation of the trial, while the prosecution has informed that the advice of the Commission had been to continue with the trial to its conclusion. *(See- Journal Entry at page 381 of the brief)*

This has resulted in the learned High Court Judge making the following Journal Entry with reads thus;

> අධිකරණයෙන්:-
>
> මේ සම්බන්ධයෙන් කරුණු විමසීමේදී නඩුවේ විමර්ෂණය සඳහා මෙන්ම නඩු පැවරීම සඳහා ද කොමිෂන් සභාවේ සාමාජිකයින් තිදෙනා ම අත්සන් කර නොමැති බව අධිකරණයට දැනුම් දෙයි. මෙම අධිකරණය ඉදිරියේ පවතින සමහර අල්ලස් නඩු වල පැමිණිල්ල විසින් නඩු පැවරීම සම්බන්ධයෙන් කොමිෂන් සභාවේ සාමාජිකයින් තිදෙනා ම අත්සන් කර නොමැති වීම මත නඩුව ඉල්ලා අස් කර ගනී. සමහර නඩු වල එසේ නොකරයි. මෙය එකම කරුණු සම්බන්දයෙන් ගන්නා විවිධ මතයක් වන හෙයින් නඩු පැවරීම සම්බන්ධයෙන් සහ නඩුවේ විමර්ෂණය සඳහා කොමිෂන් සභාවේ සාමාජිකයින් තිදෙනාගේ ම අනුමැතිය නොමැති ව මෙම නඩුව ඉදිරියට පවත්වා ගෙන යා හැකිද නැද්ද යන්න අධිකරණයේ තහවුරු කිරීමට පැමිණිල්ලට අවස්ථාව දෙමි.
>
> ඒ පිළිබඳ ව කරුණු දැක්වීම ලිඛිත ව සිදු කිරීමට අවසර පනයි."

The learned High Court Judge of Colombo has pronounced his order on 12-09-2022, which is the order sought to be challenged by this application. *(The order marked P-04 along with the petition)*

It is clear from the order that although there was no preliminary objection as to the maintainability of the action before the Court by the accused, and in fact, the accused had specifically objected to any withdrawal of the action by the prosecution, the impugned order has been pronounced on the basis that the accused raised a preliminary objection as to the jurisdiction. I find this as a clear misdirection as to the facts by the learned High Court Judge, which needs to be highlighted.

The learned High Court Judge, being guided by the judgment in the case of **Anoma S. Polwatte Vs. The Commission to Investigate Allegations of Bribery and Corruption SC/Writ Application No 01/2011, decided on 26-07-2018** has determined that the failure to get the sanction of all three Commissioners prior to filing action before the High Court amounts to a patent lack of jurisdiction and therefore *ab initio void*, hence, the action cannot be maintained.

For matters of clarity, I will now reproduce the relevant final determination by the learned High Court Judge, which appears at page 22 of the said order marked P-04.

> "ඉහත කරුණු අනුව මෙම නඩුව මහාධිකරණය ඉදිරියේ පැවරීම සඳහා මෙන්ම විමර්ශනය සඳහාද, කොමිෂන් සභාව විසින් නීත්‍යානුකූලව විධානයක් ලබා දී නැත. එය නඩුවේ මූලයටම බලපාන්නාවූ දෝෂයකි. (patent lack of jurisdiction) ඒ අනුව නඩු පැවරීම මුල සිටම දෝෂ සහගතය. (ab initio void) ඒ අනුවම පැමිණිල්ලට මෙම නඩුව චුදිතට එරෙහිව පවරා පවත්වාගෙනයා නොහැකිය."

After pronouncing the above order and, accordingly, discharging the accused from the indictment against him, on 20-09-2022, the learned High Court Judge on his own motion has made a direction to notice the parties to appear before the Court on 22-09-2022 in order to make a correction to the order pronounced on 12-09-2022.

When the matter was mentioned on the day, the learned High Court Judge has made the following Journal Entry in the case record.

> "මෙම නඩුවේ මූලික විරෝධතාවය හා සම්බන්ධ නියෝගය 2022.09.12 වන දින ප්‍රකාශයට පත් කරන ලද අතර ඒ අනුව නඩුවේ 01, 02 චොදනාවන් ගෙන් චුදිත නිදහස් කර ඇත. 2022.09.12 දින අත්සන් කර නඩු වාර්තාවට ගොනු කර ඇති නියෝගය මුද්‍රණය කිරීමේදී අනපසුවීමකින් නිවැරදි නියෝගය වෙනුවට සංස්කරණය නොකළ නියෝගයේ පිටපතක් මුද්‍රණය වී ඇත.
>
> ඒ අනුව 2022.09.12 දින නියෝගයේ ස්ථාන කිහිපයක් සංස්කරණය විය යුතුය. එකී සංස්කරණයන් මගින් නියෝගයේ හරයට හෝ නියෝගයට හානියක් නොවන හෙයින් මෙම සතිය තුල සංස්කරණය කරන ලද නියෝගයක්ද නඩු වාර්තාවට ගොනු කිරීමට කටයුතු කරමි.
>
> ඒ අනුව 2022.09.12 දින නියෝගයේ සංස්කරණය නොකළ ලෙස සටහන් කිරීමටද මේ සතිය තුල සංස්කරණය කර ගොනු කරන නියෝගය සංස්කරණය කල ලෙස සටහන් කිරීමටද පියවර ගනිමි. එහි දිනය 2022.09.12 ම සඳහන් කර එමගින් පාර්ශවකරුවන්ට හානියක් නො වන බව මෙම අධිකරණයේ ස්ථාවරයයි.
>
> සංස්කරණය කල නියෝගයේ පිටපතක් ගාස්තු රහිත ව පැමිණිල්ල ට ද ගාස්තු සහිත ව චුදිත වෙත ද නිකුත් කිරීමට අවසර දෙමි. (චුදිත මෙතෙක් නියෝගයේ පිටපතක් ලබා නොගෙන ඇති හේතුව මත එසේ ගාස්තුව ට යටත් ව නිකුත් කිරීමට නියම කරන ලදී.)
>
> මෙම කාරණාව මගින් පාර්ශවකරුවන්ට සිදු වූ අපහසුතාවය පිළිබඳව අධිකරණය කණගාටුව ප්‍රකාශ කරයි.

අද දින නීති කෘත්‍ය සටහන්වල පිටපත් ඉල්ලා සිටි. අද දින නීති කෘත්‍ය සටහන්වල පිටපත් පැමිණිල්ලට ගාස්තු රහිතවද චුදිතට ගාස්තුවට යටත්වද කිකුත් කරනු."

The learned High Court Judge has then filed of record, the order what he termed as the edited order (සංස්කරණය කල) dated as 12-09-2022. This is the order the petitioner has produced marked P-05 along with the petition.

It was the submission of the learned Counsel for the Commission that the procedure adopted by the learned High Court Judge on 22-09-2022 to pronounce another order on the basis that it is an edited version of the order pronounced on 12-09-2022 was in total violation of section 283(4) of the Code of Criminal Procedure Act, and shall have no legal effect.

The learned Counsel contended that although any clerical error or any obvious defect can be corrected even after the rising of the Court, this was an irregularity that cannot be considered as such.

The learned Counsel brought to the notice of the Court the following material differences of the orders marked P-04 and P-05.

Old One (P4)	**New One (P5)**
Page 2 4th paragraph	Page 2 4th paragraph not available
Page 3 1st, 2nd, 3rd paragraphs	Page 3 1st, 2nd, 3rd paragraphs not available
Page 3 Section 16 (3) available	Page 3 Section 16 (3) not available
Page 8 Paragraph 2	Not available in the new one

Page 16 5th paragraph (last part) similar paragraph	Page 15 1st paragraph. Later part had been inserted newly. 4 rows had been inserted.
Page 18 From the bottom 2nd paragraph	Page 16 After No. 57 Not available
Page 18, 19 Not available	Page 16, 17 2 new paragraphs had been inserted. Paragraph 58, 59 inserted newly.

It was her view that both the orders cannot be allowed to stand, as they have no legal validity before the law as they stand now.

Before considering the other points raised during the hearing of this application, I believe that the above matters brought to the attention of the Court needs to be addressed, as find them to be important questions of law.

As I have stated before, the learned High Court Judge was misdirected when it was determined that the accused raised a jurisdictional objection, whereas, it was not, and it had been the learned High Court Judge who has thought it fit to raise a jurisdictional objection on his own motion.

It needs to be reminded that our system of law is adversarial and not inquisitorial where Judges are not expected to play the part of a prosecutor or a defence Counsel in a trial.

The relevant section 39 of the Judicature Act under which an objection to the jurisdiction can be considered reads as follows;

> **39. Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of first instance neither party shall afterwards be entitled to object to the jurisdiction of such Court, but such Court shall be taken and held to have jurisdiction over such action, proceeding or matter:**
>
> **Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a Court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such Court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceeding null and void.**

No doubt, a Judge can act even in a situation where no jurisdictional objection was taken as provided for in the proviso of section 39, it is my considered view that the proviso can only be applied to situations where there is a patent lack of jurisdiction.

Although the learned High Court Judge had determined that the situation considered by him to dismiss the action where, admittedly, all three Commissioners have not given their sanction to initiate action as a matter where patent lack of jurisdiction exists, I am in no position to agree. I find that the learned High Court Judge has again been misdirected as to the question of jurisdiction and law.

This is an action initiated by the Director General of the Commission in terms of the Bribery Act where the High Court has the jurisdiction to hear and determine the matter. Only in a situation where the High Court has no jurisdiction to hear and determine a matter, the question of patent lack of jurisdiction comes into play, whereas, this was no such situation.

The question of jurisdiction considered by the learned High Court Judge, if it can be considered as a jurisdictional question, is a situation where the prosecution has been initiated without having the sanction of all the commissioners, which is clearly a procedural defect, which can only be viewed as a latent lack of jurisdiction. Even if the action is dismissed on such a basis, there can be no bar for the Director General of the Commission to file the action again before the High Court after rectifying the said procedural defect.

In the case of **P. Beatrice Perera Vs. The Commissioner of National Housing 77 NLR 361 at 366, Tennekoon, C.J.** has discussed the difference between the patent lack of jurisdiction and latent lack of jurisdiction and the effect of such a situation in the following manner.

> *"Lack of competency in a Court is a circumstance that results in a judgment or order that is void. Lack of competency may arise in one of two ways. A Court may lack jurisdiction over the cause of matter or over the parties; it may also lack competence because of failure to comply with such procedural requirements as are necessary for the exercise of power by the Court. Both are jurisdictional defects; the first mentioned of these is commonly known in the law as 'patent' or 'total' want of jurisdiction or a defectus jurisdictionis and the second a 'latent' or 'contingent' want of jurisdiction or a defectus triationis. Both classes of jurisdictional result in judgments or orders, which are void. However, an important difference must also be noted. In that class of case where the want of jurisdiction is patent, no waiver of objection or acquiescence can cure the want of jurisdiction; the reason for this being that to permit parties by their conduct to confer jurisdiction on a tribunal which has none would be to admit a power in the parties to the litigation to create new jurisdictions or to extend a jurisdiction beyond its existing limits, both of which are within the exclusive privilege of the legislature; the proceeding in cases within this category are non coram judice and the want of jurisdiction is incurable.*

In the other class of cases, where the want of jurisdiction is contingent only, the judgment or order of Court will be void only against the party on whom it operates but, acquiescence, waiver or inaction on the part of such person may estop from making or attempting to establish by evidence, any averment to the effect that the Court was lacking in contingent jurisdiction."

For the reasons as considered above, I am of the view that the learned High Court Judge had no basis to consider this matter as a preliminary objection raised by the accused when there was no such objection, and on the basis that this was a situation of patent lack of jurisdiction, whereas, it was not.

I find that this alone would vitiate the order of dismissal of the action by the learned High Court Judge.

The next matter I would like to draw my attention is the manner in which the learned High Court Judge decided to insert the 2nd order marked as P-05 on the same matter after pronouncing his order on 12-09-2022.

It is well settled law that once a judgment, or an order for that matter, is pronounced by a Judge, such a judgment or the order cannot be altered or reviewed by the Judge who pronounced it unless in terms of section 283(4) of the Code of Criminal Procedure Act. Such a judgement or an order can be reviewed only by a competent appellate Court upon an application in that regard

The relevant section reads thus;

283. (4) When a judgement has been so signed it cannot be altered or reviewed by the Court which gives the judgment:

Provided that a clerical error may be rectified at any time and that any other error may be rectified before the Court rises for the day.

In the case of **Hari Singh Mann Vs. Harbhajan Singh Bajwa AIR 2001 SC 43** the Indian Supreme Court considering the provisions of section 362 of the Indian Code which has very much similar provision to our Code,

It was held:

> *"Section 362 of the Code mandates that no Court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error. The Section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error."*

I am in no position to agree with the procedure adopted by learned High Court Judge in this regard, which was in contravention of the limitations imposed on a trial Judge to alter a judgment or an order once pronounced.

A Judge is expected to pronounce a well-considered judgment or an order, which amounts to the final determination of the question or questions before him. It is my view that, therefore, a Judge has no legal right to enter another order on the same matter, on the basis that the previous order was the unedited version of his order and it has been pronounced due to a mistake occurred in printing the same, however good the intentions of the learned High Court Judge to pronounce an order he believed to be a more perfect one, although it may not have changed the previously pronounced final determination.

I find that by adopting such a procedure, the learned High Court Judge, maybe inadvertently, has created a situation where there are two orders in the same matter of which the affected parties will be unable to understand the rationale behind it.

If this kind of procedure is allowed to stand, no finality can be attached to any such order or a judgment of a Court of first instance, and the purpose of appellate procedure available for any dissatisfied party of an action would become meaningless.

Therefore, it is my considered view that both the orders marked P-04 and P-05 cannot be allowed to stand.

Having determined the above questions of law in favour of the petitioner, to have a finality on the matter, I will now focus my attention to the legal provisions considered by the learned High Court Judge to dismiss the action initiated by the Director General of the Commission.

For that purpose, I will only consider the order marked P-04 dated 12-09-2022, which was the order that has to be considered for any such purpose.

It is clear that the learned High Court Judge has taken guidance from the case of **Anoma S. Polwatte Vs. The Director General of the Commission to Investigate allegations of Bribery or Corruption (Supra)** in determining that the action cannot be maintained before the High Court.

This was a case where Anoma S Polwatte challenged the decision of the Director General of the Commission to initiate action against her by way of a Writ application filed before the appropriate forum, namely, before the Supreme Court in terms of section 24(1) of the Commission to Investigate Allegations of Bribery or Corruption Act (CIABOC), where she sought a Writ, which was granted based on the applicability of section 11 of the CIABOC Act.

It needs to be noted that when determining the matter, the learned High Court Judge did not have the priceless advantage of the judgment of the Supreme Court in the case of **Indiketiya Hewage Kusumadasa Mahanama Vs. The Commission to Investigate allegations of Bribery or Corruption, SC TAB-1A and 1B/ 2020 decided on 11-01-2023,** where the Five Judge Bench of the Supreme Court resolved the application of section 11 of the CIABOC Act in relation to actions filed before the High Court.

Vijith Malalgoda, P.C., J. referring to the Anoma Polwatte case at page 44 stated thus;

> *"As already observed by us, when deciding the above case, this Court had never intended to impose an additional requirement of submitting a written directive given by the Commission when forwarding an indictment by the Director General of the CIABOC to High Court other than following the provisions of already identified under section 12(1) and (11) of the CIABOC Act. If the Director General is directed under section 11 of the CIABOC Act by the CIABOC to forward an indictment, he is only bound to follow the provisions of section 12(1) and (11) of the CIABOC Act. In the absence of any complaint that the Director General of CIABOC had failed to comply with sections 12(1) and (11) if the CIABOC Act when forwarding the indictment before the High Court at Bar, it is correct in refusing the jurisdictional objection raised on behalf of the 2nd accused before the High Court at Bar. The trial Judge before whom the indictment is fled is therefore bound to accept the indictment and take up the trial unless there is material to establish that Director General of CIABOC had failed to comply with the provisions of sections 12(1) and (11) of the CIABOC Act. Any party who intends to challenge an indictment forwarded by the Director General CIABOC on the basis that the CIABOC has failed to comply with section 11 of the CIABOC Act, the said challenge could only be raised in an appropriate action before an appropriate forum."*

The appropriate action and the appropriate forum referred by his Lordship is the filing an action in the nature of a Writ before the Supreme Court in terms of section 24(1) of the CIABOC Act.

It is therefore clear that the learned High Court Judge had no mandate to decide on an administrative function of the CIABOC, when there is a specific forum in terms of the Act itself to amount a challenge to such an administrative function.

I am of the view that the learned High Court Judge was misdirected as to the relevant facts and the law when it was decided on his own motion to consider the question of jurisdiction on the wrong premise of patent lack of jurisdiction in deciding to dismiss the action and discharge the accused from the proceedings.

This is an action where the petitioner has sought relief from this Court urging the Court's intervention by invoking the revisionary jurisdiction of this Court.

It was held in the case of **Hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd (1987) 1 SLR 5** that,

> *"It is settled law that the exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In the case of **Wijesinghe Vs. Thamararatnam (Sriskantha Law Report Vol. IV page 47)** that,

> *"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the Court."*

In the case of **Vanik Incorporation Ltd. Vs. Jayasekare (1997) 2 SLR 365** it was observed,

> *"Revisionary powers should be exercised where a miscarriage of justice has occasioned due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

For the reasons considered as above, I am of the view that this is a situation where a clear positive miscarriage of justice has occasioned, where exceptional circumstances exist warranting the intervention of this Court to correct the said positive miscarriage of justice.

Accordingly, I set aside the order dated 12-09-2022 marked P-04 and the order dated P-05 of even date, but filed as a part of the case on 22-09-2022, as both those orders cannot be allowed to stand.

I direct that the learned High Court Judge shall proceed to hear this action commencing from where it stood before this order was pronounced, after taking due procedural steps in that regard.

The Registrar of the Court is directed to communicate this order to the High Court of Colombo for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal